# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1885.**

No. 887.

BERNHARD ARNSON AND ELLIS WILZINSKI, PLAINTIFFS IN ERROR,

*vs.*

THOMAS MURPHY, LATE COLLECTOR OF THE PORT OF NEW YORK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

**FILED JUNE 20, 1885.**

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the southern district of New York, Greeting:

[Seal of U. S. Circuit Court South. Dist. New York.]

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said circuit court before you, or some of you, between Bernhard Arnson and Ellis Wilzinski, plaintiffs, and Thomas Murphy, collector of the port of New York, defendant, a manifest error hath happened, to the great damage of the said plaintiffs, as is said and appears by their complaint:

We, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Justices of the Supreme Court of the United States, at the Capital in the City of Washington, together with this writ, so that you have the same at the said place, before the Justices aforesaid, on the second Monday of October next, that the record and proceedings aforesaid being inspected, the said Justices of the Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 22d day of June, in the year of our Lord one thousand eight hundred and eighty-five, and of the Independence of the United States the one hundred and ninth.

TIMOTHY GRIFFITH,
*Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.*

Allowed.
C. L. B.

2 UNITED STATES OF AMERICA, *Southern District of New York,* } *ss:*

I, Timothy Griffith, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify that the following pages, numbered from three to fifty-nine, inclusive, contain a true and complete transcript of the records and proceedings had in said court in the case of Bernhard Arnson and Ellis Wilzinski, plaintiffs in error, against Thomas Murphy, collector of the Port of New York, defendant in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 14th day of July, in

the year of our Lord one thousand eight hundred and eighty-five, and of the Independence of the United States the one hundred and tenth.

[Seal Circuit Court of New York.]

TIMOTHY GRIFFITH, *Clerk.*

[Endorsed:] 5991. U. S. Supreme Court. Bernard Arnson *ano.*, pl'ffs in error, *vs.* Thomas Murphy, def't in error. Writ of error. Kaufmann & Sanders, attorneys for pl'ffs in error. Due service of a copy of the within writ of error is hereby admitted, this 22 of June, 1885. Elilm Root, attorney for def'ts in error. U. S. circuit court. Filed June 22, 1885. Timothy Griffith, clerk.

3 *Summons.*

New York Supreme Court, New York County.

BERNHARD ARNSON and ELLIS WILZINSKI, Plaintiffs,
*ag'st*
THOMAS MURPHY, Defendant.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer on the plaintiffs' attorney within twenty days after service of this summons, exclusive of the day of service; and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated New York, May 6, 1879.

SIGISMUND KAUFMANN,
*Plaintiffs' Attorney.*

P. O. address: New York city. Office: No. 39 Nassau St., New York city.

4 The President of the United States of America to the judges of the supreme court of the State of New York, Greeting:

We, for certain reasons, being desirous that our circuit court of the United States for the southern district of New York, in [L. S.] the second circuit, shall be certified of a certain cause commenced before you against Thomas Murphy, defendant, by Bernard Arnson & ano. plaintiffs, do therefore command you that the record and proceedings in said cause you distinctly and openly send to the said circuit court, at the city of New York, on the 27th day of September, 1879, as fully and amply as the same are remaining before you, by whatever names the said parties may be called therein, together with this writ, that our said Court may cause to be further done thereupon what of right ought to be done.

Witness Morrision R. Waite, Esquire, Chief Justice of the Supreme Court of the United States, the 25th day of Sept., 1879.

JOHN I. DAVENPORT, *Clerk.*

STEWART L. WOODFORD,
*Defendant's Attorney.*

5 [Endorsed:] 5991. U. S. circuit court. Bernard Arnson & ano. *vs.* Thomas Murphy. Copy. Certiorari. Stewart L. Woodford, defendant's attorney. Take notice that the within is a copy of a certiorari this day issued out of the circuit court of the United States for the southern district of New York. New York, Sept. 25th, 1879. Yours, Stewart L. Woodford, defendant's attorney. To S. Kaufmann, plaintiffs' attorney. Due service of a copy of the within and of the above notice is hereby admitted. New York, Sept. 25, 1879. S. Kaufmann, plaintiffs' attorney.

Arnson & Wilzinskey, Importers.

N. Y. Supreme Court.

BERNHARD ARNSON & ANO. *vs.* THOMAS MURPHY, Collector of the Port of New York.

| Description of merchandise. | Place from which imported. | Name of vessel. | Date of invoice. | Date of entry at custom-house. | Am't of duty exacted in excess. | Date of payment. | Date of protest. | Date of appeal. | Date of decision of Sec't'y Treasury. |
|---|---|---|---|---|---|---|---|---|---|
| Nitro Benzole | Liverpool | The Queen | Feb'y 25,'71 | M'ch 24,'71 | $127 80 | Ap'l 26,'71 | Ap'l 26,'71 | June 13,'71 | None received. |
| " | " | Italy | M'ch 27,'71 | Ap'l 19,'71 | 132 00 | May 24,'71 | May 23,'71 | " " | |
| " | " | Pennsylvania | " 10,'71 | " 10,'71 | 132 00 | June 13,'71 | June 13,'71 | " " | |
| " | " | Italy | May 4,'71 | May 23,'71 | 143 00 | July 12,'71 | July 12,'71 | July 12,'71 | |
| " | " | Virginia | May 12,'71 | June 5,'71 | 143 00 | " 17,'71 | July 17,'71 | July 17,'71 | |
| " | " | Abyssinia | June 23,'71 | July 17,'71 | 143 60 | " " | " " | " " | |
| " | " | Atlantic | July 7,'71 | Aug. 1,'71 | 143 40 | Aug. 1,'71 | Aug 1,'71 | Aug. 1,'71 | |
| " | " | Aleppo | Feb'y 10,'71 | M'ch 11,'71 | 130 20 | July 31,'71 | July 31,'71 | July 31,'71 | |
| " | " | Atlantic | May 27,'71 | June 22,'71 | 289 85 | July 22,'71 | July 22,'71 | July 22,'71 | |
| " | " | Oceanic | Sept. 2,'71 | Sept. 18,'71 | 129 50 | Sept. 18,'71 | Sept. 18,'71 | Sept. 18,'71 | |
| " | " | England | " 26,'71 | Oct. 23,'71 | 130 20 | Nov. 29,'71 | Nov. 29,'71 | Nov. 29,'71 | |

Please take notice that the foregoing is the bill of particulars herein.

S. KAUFMANN,
*Plaintiffs' Attorney,*
39 Nassau St., N. Y. city.

7 (Endorsed:) 5991. N. Y. Supreme Court. Bernhard Arnson & ano. *vs.* Thomas Murphy, collector of the port of New York. Bill of particulars. Received: U. S. attorney's office, Sept. 25th, 1879. S. Kaufmann, plaintiffs' attorney, 39 Nassau St., N. Y. city. To S. L. Woodford, U. S. att'y.

8 Supreme Court, New York County.

BERNHARD ARNSON & ELLIS WILZINSKI
*vs.*
THOMAS MURPHY, Collector of the Port of New York.

The plaintiff-, by Sigismund Kaufmann, their attorney, complaining of the defendant, allege—

I. That at the time hereinafter mentioned they were, and still are, copartners doing business in the city of New York, under the firm name and style of Arnson & Wilzinski.

II. That at said times the defendant was collector of the port of New York, and at sundry times between the 25th April, 1871, and 30th November, 1872, at the city of New York, he received
9 from plaintiffs herein the sum of one thousand six hundred and forty-four $\frac{65}{100}$ dollars gold coin of the United States of America, to the use of the plaintiffs herein, which he promised thereupon to repay upon demand.

III. That thereafter and before this action the plaintiff- duly demanded payment of said sum from defendant, but which defendant wholly refused to pay or any part thereof.

IV. That no part thereof has been paid, and that there is now due to these plaintiffs from defendant the sum of one thousand six hundred and forty-four $\frac{65}{100}$ dollars gold, with interest on said sum from November 29, 1871.

Wherefore the plaintiffs pray judgment against the defendant herein for the sum of one thousand six hundred and forty-
10 four $\frac{65}{100}$ dollars gold, with interest on said sum from November 29th, 1871, besides the costs of this action.

SIGISMUND KAUFMANN,
*Plaintiffs' Attorney.*

Office & P. O. address, 39 Nassau St., N. Y. City.

CITY AND COUNTY OF NEW YORK, *ss:*

Bernhard Arnson, being duly sworn, says: That he is one of the plaintiffs herein; that the foregoing complaint is true of his own knowledge, except as to matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

BERNHARD ARNSON.

Sworn to before me, this 20th day of June, 1879.
(Sig'd) EDWARD STOUSE,
*Notary Public, N. Y. Co.*

Endorsment as follows: N. Y. supreme court. Bernhard
11 Arnson *vs.* Thomas Murphy. Bill of complaint. S. Kaufman, def't's att'y, 39 Nassau St., N. Y. city. Received U. S. attorney's office Sept. 23, 1879.

12 United States Circuit Court, Southern District of New York.

BERNARD ARNSON & ELLIS WILZINSKI
*vs.*
THOMAS MURPHY, Collector, &c.

The answer of the defendant herein, by Stewart L. Woodford, his attorney, to the complaint of the plaintiffs in the above entitled action.

I. He admits he was, at the times in said complaint mentioned, collector of the port of New York, and, in such official capacity, received payment from the plaintiffs for and on account of duties due to the United States, under the laws thereof, upon certain importations of merchandise imported by said plaintiffs into the port of New York from foreign countries.

13 II. He alleges, on information and belief, that any and all moneys received by him from plaintiffs, at the times in said complaint mentioned, were paid by said plaintiffs as a debt due by them to the United States, and not otherwise, and were received by defendant by virtue of his office as said collector, and under the direction of the Secretary of the Treasury, and for and on account of the United States, and were forthwith thereafter, and before the commencement of this action, or the service of any protest, paid into the Treasury of the United States; and that the amount of said moneys, so received from plaintiffs, were the amounts due from them to the United States, according to the rate of duty im-

14 posed by law upon the several articles of merchandise by them imported and assessed with the duty, and no other sums than duties regularly assessed and ascertained and liquidated according to law, upon the plaintiffs' import entry thereof, were collected or received by defendant from the plaintiffs.

III. And as to any other allegations in said complaint contained, not hereinbefore fully answered, defendant denies the same, and each thereof, and leaves the plaintiffs to make such proof thereof as they may be advised.

IV. For a separate and further defence the defendant alleges that the cause or causes of action set forth in the complaint herein occurred to the said plaintiffs more than six years prior to

15 the commencement of this action, and that therefore the same is or are barred by the New York Statute of Limitation- in such case made and provided.

Wherefore defendant demands judgment that the complaint be dismissed with costs.

STEWART L. WOODFORD,
*United States Attorney for Defendant.*

SOUTHERN DISTRICT OF NEW YORK, } ss:
*City and County of New York,* }

Thomas Murphy, being duly sworn, says: That he is the defendant above named, and that the foregoing answer is true to his own

knowledge except as to the matter therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

THOMAS MURPHY.

Sworn to before me, this 25th day of September, 1879.
THOMAS GREENWOOD,
*Notary Public, New York City.*

16 "Endorsed:" U. S. circuit court, southern district of New York. Bernard Arnson & ano. *vs.* Thomas Murphy, collector, &c. Copy. Answer. Stewart L. Woodford, United States attorney, attorney for defendant. Due service of a copy of the within copy [of] answer is hereby admitted. New York, October 4, 1879. Signed, S. Kaufmann, plaintiffs' attorney. To S. Kaufmann, plaintiffs' attorney.

17 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, on Tuesday, the second day of December, in the year of our Lord one thousand eight hundred and eighty-four.

Present: The Honorable Alfred C. Coxe, sitting as circuit judge.

BERNARD ARNSON & ano.
*vs.*
THOMAS MURPHY. } 5991.

Now comes the plaintiff, by Lewis Sanders, Esq., his attorney, and wa-ves the trial of this cause.

Likewise comes the defendant, by his attorney, Sam'l B. Clarke, Esq., ass't U. S. attorney.

Thereupon the jury is impannelled, and the court proceeds to trial.

After hearing the evidence of the parties and the arguments of counsel the court directs the jury to find a verdict for the defendant. Thereupon the jury rendered a verdict whereby they find for the defendant.

18 On motion of counsel for the plaintiffs the court ordered that the plaintiffs have a stay of proceedings for thirty days.

A copy.

TIMOTHY GRIFFITH, *Clerk.*

19 *Judgment.*

United States Circuit Court, Southern District of New York.

BERNARD ARNSON & ano.
*vs.*
THOMAS MURPHY. } 5991.

The issues in this action having been brought on for trial before Mr. Judge Coxe and a jury at a circuit court of the October term, 1884, and the issues having been tried, and a verdict for the defend-

ant having been duly rendered on the second day of December, 1884, and his costs having been adjusted at $53.35:

Now, on motion of Elihu Root, United States attorney, for defendant, it is adjudged that the defendant have judgment against the plaintiffs upon the issues in this action, and that he recover the sum of $53.35, his taxed costs, and have execution therefor.

Judgment signed, this 15th day of May, 1885.

M. A. SHIELDS,
*Deputy Clerk.*

20 [Endorsed:] 5991. United States circuit court. Bernard Arnson & ano. *vs.* Thomas Murphy. Judgment roll. Elihu Root, United States attorney, for defendant. Filed ——, 187—. Costs, $53.35. U. S. circuit court. Filed May 15th, 1885. Timothy Griffith, clerk.

21 *Plaintiffs' Bill of Exceptions.*

(Original.)

United States Circuit Court, Southern District of New York.

BERNARD ARNSON and ELLIS WILZINSKI, Plaintiffs, and Plaintiffs in Error,
*against*
THOMAS MURPHY, Collector of the Port of New York, Defendant, and Defendant in Error.
} N. S. 5991.

This cause regularly came on for a new trial upon the mandate of the Supreme Court of the United States herein, dated January, 1884, before his honor, Alfred C. Coxe, district judge, sitting as circuit judge by regular appointment, and a jury, at the circuit court of the United States held in and for the south. district of New York, on the 2d day of December, 1884.

Messrs. Kaufmann & Sanders appeared for the plaintiffs,
22 and Messrs. S. B. Clark and Thomas Greenwood, as assistant United States attorneys, for defendant.

The following facts were put in evidence as agreed upon by both hereto, to wit:

This action was commenced in the supreme court of the State of New York on the 8th day of May, 1879, and was removed to this court on the 25th day of September, 1879, by certiorari.

The plaintiffs, to sustain the issues on their part, proved the importation, at the times hereinafter stated, of nitro-benzole by plaintiffs at the port of New York from Liverpool, England; that the entry of said merchandise was made at the custom-house at New York in due form of law at the time and upon the invoices hereinafter mentioned.

That the collector of the port of New York (the defendant in this suit) imposed a duty upon said nitro-benzole at the rate of 50
23 per cent. ad valorem as an essential oil not otherwise provided for under section 5 of the act of July 14, 1862; that plaintiffs, under protest, paid said duty to the defendant as collector of the

port of New York upon said importations (except in case of the plaintiffs' importations per Pennsylvania, April 10th, 1871, and per Italy, May 23rd, 1871) at said rates, claiming that nitro-benzole was only liable to a duty of forty cents per gallon, being composed of benzole and nitric acid.

That the said duties so paid were each and every of them paid under protest, except in case of plaintiffs' said importations per the Pennsylvania and Italy.

That as to the other importations specified in their bill of particulars herein plaintiffs duly protested in writing against the exaction of said duty at the dates hereinafter mentioned, claiming
24 that duty at 50 per cent. ad valorem was erroneous, and that the lawful duty was but forty cents per gallon, as nitro-benzole is a non-enumerated article, and as such non-enumerated article is liable only to the highest rate of duty imposed upon either of its component parts, agreeable to the similitude clause of the act of August 30th, 1842, section 2499 of the United States Revised Statutes.

That on the same days respectively plaintiffs duly appealed to the Secretary of the Treasury of the United States from said decision of the defendants exacting said amounts as duty except in case of their said importations per the aforesaid Pennsylvania and Italy and per the Queen, March 27th, 1881.

That the amount of duty claimed to have been exacted in
25 excess on such importations is the sum of $1,644.65.

Plaintiffs also proved that said nitro-benzole was only liable to a duty of forty cents per gallon instead of 50 per cent. ad valorem.

It was agreed by the counsel for the respective parties that if plaintiffs were entitled to recover anything, that the amount should be assessed before the proper officer at the custom-house and entered in the judgment.

The dates of the invoices and entries of the said nitro-benzole at the port of New York, and of the payment of duties thereon, the amounts claimed to have been paid in excess of the lawful duty, the date of protests and appeals, are correctly set out in the following schedule hereto annexed and marked Exhibit A:

## PLAINTIFFS' EXHIBIT A.

ARNSON *vs.* MURPHY, Collector of the Port of New York.

ARNSON & WILZINSKI, Importers.



| Description of merchandise. | Place from which imported. | Name of vessel. | Date of invoice. | Date of entry at custom-house. | Am't of duty exacted in excess. | Date of payment. | Date of protest. | Date of appeal. | Date of decision of See'y Treas. |
|---|---|---|---|---|---|---|---|---|---|
| Nitro Benzole | Liverpool | The Queen | Feb. 25,'71 | M'ch 24,'71 | 127 80 | April 26,'71 | April 26,'71 | | None received. |
| " | " | Italy | M'ch 27,'71 | April 19,'71 | 132 00 | May 24,'71 | May 24,'71 | June 13,'71 | |
| " | " | Pennsylvania | " 10,'71 | " 10,'71 | 132 00 | June 13,'71 | June 13,'71 | " " " | |
| " | " | Italy | May 4,'71 | May 23,'71 | 143 00 | July 12,'71 | July 12,'71 | July 12,'71 | |
| " | " | Virginia | " 12,'71 | June 5,'71 | 143 10 | " 17,'71 | July 17,'71 | " 17,'71 | |
| " | " | Abyssinia | June 23,'71 | July 17,'71 | 143 60 | " 17,'71 | " " " | " " " | |
| " | " | Atlantic | July 7,'71 | Aug. 1,'71 | 143 40 | Aug. 1,'71 | Aug. 1,'71 | Aug. 1,'71 | |
| " | " | Aleppo | Feb. 10,'71 | M'ch 11,'71 | 130 20 | July 31,'71 | July 31,'71 | July 31,'71 | |
| " | " | Atlantic | May 27,'71 | June 22,'71 | 289 85 | July 22,'71 | July 22,'71 | July 22,'71 | |
| " | " | Oceanic | Sept. 2,'71 | Sept. 18,'71 | 129 50 | Sept. 18,'71 | Sept. 18,'71 | Sept. 19,'71 | |
| " | " | England | " 26,'71 | Oct. 23,'71 | 130 20 | Nov. 29,'71 | Nov. 29,'71 | Nov. 29,'71 | |

27 Mr. SANDERS: This, your honor, is subject to any corrections the defendants may choose to make.

Mr. GREENWOOD: If your honor please, to save the time of the court, I offer a statement which I have here as to the dates of liquidation and dates of protest, which I will hand to the stenographer. The part which I desire to have in evidence is that part as marked in pencil, from the date of entry up to but not including the number of the appeal.

The portion of the statement indicated is marked Defendant's Exhibits No. 1, viz:

*Defendant's Exhibit No.* 1.

Showing, in case of plaintiffs' importations, which were made by the following-named vessels, and which were invoiced and entered on the following dates, the dates of the liquidation of duties exacted thereon:

28

| Name of Vessel. | Date of Invoice. | Date of Entry. | Date of Liquidation. |
|---|---|---|---|
| The Queen | Feb. 25, 1871 | March 24, 1871. | Aug. 26, 1871. |
| Italy | March 27, 1871 | April 19, 1871. | May 19, 1871. |
| Pennsylvania | " 10, 1871 | April 10, 1871. | May 27, 1871. |
| Italy | May 4, 1871 | May 23, 1871. | June 29, 1871. |
| Virginia | May 12, 1871 | June 5, 1871. | July 13, 1871. |
| Abssinia | June 23, 1871 | July 17, 1871. | Dec. 6, 1871. |
| Atlantic | July 7, 1871 | Aug. 1, 1871. | Dec. 16, 1871. |
| Aleppo | Feb. 10, 1871 | March 11, 1871. | July 26, 1871. |
| Atlantic | May 27, 1871 | June 22, 1871. | July 25, 1871. |
| Oceantic | Sept. 2, 1871 | Sept. 18, 1871. | Dec. 16, 1871. |
| England | Sept. 26, 1871 | Oct. 23, 1871. | Jan. 6, 1872. |

[On margin:] K. & S.—E. R.
K. & S.—E. R.
K. & S.—E. R.

Mr. GREENWOOD: This paper which I have now put in, your honor may not be aware, is by way of correction of evidence which was put in yesterday by the plaintiffs under an agreement made with counsel in open court yesterday, when he read a statement which might be called an agreed statement of facts. Plaintiffs' counsel agreed that Exhibit A might be corrected in the particulars shown in defendant's Exhibit No. 1. Plaintiffs then rested.

29 "The defendant thereupon moved the court to direct a verdict in favor of the defendant as to the plaintiffs' impor-ations per the aforesaid Queen, on the ground that plaintiffs had made no appeal in case thereof as required by law. To the granting of this motion the plaintiffs consented, and the court thereupon duly directed a verdict for the defendant as to said 'importations.'"

We now ask your honor to direct a verdict for the defendant as to each of the other entries specified in the plaintiffs' bill of particulars, and which are the subject of this action, on the ground that, to entitle the plaintiffs to recover, after an appeal has been taken from the decision of the collector as to the rate and amount of duty, the plaintiffs, to recover, must show either that they paid the duties be-

fore the decision of the Secretary and brought their suit
30 within ninety days after such decision, or that they paid the duties after such decision and brought their suit within ninety days after the payment of such duties, or that ninety days had elapsed after their appeal to the Secretary and no decision had been made, and that they brought their suit after the expiration of such ninety days; and also on the ground that they have not proved facts sufficient to entitle to recover.

"The COURT: For the present I overrule this motion to direct a verdict in favor of the defendant."

"The defendant then moved the court to direct a verdict for the defendant as to the plaintiffs' importations per Pennsylvania, April 10th, 1871, and per Italy, May 23d, 1871, on the ground that no protest was made in *of* either of these importations within ten 'days after liquidation.'"

"The last-mentioned motion the court duly granted."

31 Mr. GREENWOOD: I now offer in evidence the decisions of the Secretary of the Treasury on the appeal from the decision of the collectors as to the Pennsylvania and as to the Italy, of April 19, 1871, being dated July 12, 1871. As to each and every other entry in suit the Secretary's decision on the appeal from the collector's decision is dated May 10, 1872.

Mr. SANDERS: I object to them, on the following grounds:

First. That no such defence is pleaded. Being a statute of limitation, it must be pleaded.

Second. That the papers which purport to be such decisions of the Secretary of the Treasury were not communicated to the plaintiff.

The COURT: The proposition comes back to the question, which I hoped might be avoided in the case, namely, whether or not
32 this provision of the statute is a limitation or a condition precedent; in other words, whether the burden is upon plaintiff to prove that the condition of the statute have been fulfilled or upon the defendant to prove that they have not been.

I have reached the conclusion I have with a great deal of regret, because it seems to me that this is a meritorious case. But without this statute the plaintiff has no standing whatever in court. It is strictly a statutory proceeding which he is required to follow, and, as I read the statute, there are three conditions for him to fulfill before he can maintain his action. First, he must have protested within ten days; second, he must have appealed within thirty days, and, third, he must have brought his action within ninety
33 days after adverse decision by the Secretary of the Treasury. Or, if he proceeds upon the other clause of the statute, he must show that there has been no decision and that his action was brought after ninety days from appeal. I see no way to separate these conditions. It is a strictly statutory proceedings, and was passed evidently with the intention upon the part of Congress that

these parties should pursue their remedy before the Department as far as possible.

Therefore I must hold that it is incumbent upon the plaintiff as a condition precedent to his recovery to show first, that he has protested; secondly, that he has appealed; and thirdly, that this action was brought within the time required by the statute.

Mr. SANDERS: Of course I object to your honor's decision, and take an exception on the part of the plaintiffs.

34 Mr. SANDERS: It does not appear that there was any decision by the Secretary of the Treasury.

The COURT: To maintain your case, you must show affirmatively that there was no decision.

Mr. SANDERS: To that we except.

Mr. CLARKE: Are we to understand now that the plaintiffs are going on with the case?

Mr. SANDERS: Yes. I call Mr. Bernard Arnson.

BERNARD ARNSON, being duly sworn and examined as a witness for the plaintiffs, testifies:

By Mr. SANDERS: Q. You are one of the plaintiffs in this suit?

A. Yes, sir.

Q. Did you ever receive any notice prior to the commencement of this suit of the decision on your appeals from the decisions of the collector of the port on the importations involved in this

35 action; notice of the Secretary of the Treasury decision.

Mr. GREENWOOD: We object to that on the ground that it is immaterial whether the decision was received or not.

The COURT: I think the objection is well taken as I read the statute, it is not incumbent upon the Secretary to communicate the decision.

Mr. SANDERS: The plaintiffs except.

Defendant's counsel then said that as we have the decisions of the Secretary here, it would be better to put them in evidence so as to avoid a new trial, and we offer them for that purpose.

The COURT: In my view of the case these decisions are unimportant, but for the purpose of raising the question suggested, and to save further litigation by avoiding in any event another appeal it may be advisable to admit them.

36 Mr. SANDERS: That raises the question whether they have a right to put them in now under the pleadings. We object to it.

The COURT: Your objection is on the ground that they cannot offer the proof, because they have not pleaded it; that is, a statute of limitation, and must be set up affirmatively in the answer.

Mr. SANDERS: Yes, sir; and we have an exception.

The papers now admitted in evidence consist of a certificate and two decisions.

The papers are marked, respectively, Defendant's Exhibits Numbers 2 A, 2 B, and 2 C, as follows:
H. B. J.
M. N.

U. S. Circuit Court, S. D. N. Y.

DEF'T'S EXHIBIT No. 2 A.

James H. Fish, stenographer.

UNITED STATES OF AMERICA,
TREASURY DEPARTMENT, *April* 16, 1884.

Pursuant to section 882 of the Revised Statutes, I hereby
37 certify that the annexed letters are copies of decisions recorded in this Department.

In witness whereof I have hereunto set my hand and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

[L. S.] (Signed) CHARLES J. FOLGER,
*Secretary of the Treasury.*

W. F.

U. S. Circuit Court, S. D. N. Y.

DEF'T'S EXHIBIT No. 2 B.

James H. Fish, stenographer.

TREASURY DEPARTMENT, *July* 12, 1871.

THOMAS MURPHY, Esq., *Collector of Customs, New York.*

"SIR: Messrs. Arnson & Wilzinski have appealed (1099 *a* and 1100*a*) from your decision assessing duty at the rate [of] per centum ad valorem on certain nitro-benzole imported by them into
38 your port per 'Pennsylvania' and 'Italy' in April, and 'Erin,' May 16, 1871. You state that on the importation per 'Pennsylvania' the protest was not lodged in time by the importers.

"The appeal (1099 *a*) therefore, so far as it relates to the entry by that vessel, cannot be entertained. As regards the other entries, it appears from your report and that of the appraiser that the merchandise in question was classified for duty at the above rate by virtue of Department's decision on the question (Synopsis 200), dated August 22, 1868, and its subsequent affirmance thereof, dated April 10, 1871, under the provisions in the 5th section of the act of July 14, 1862, and for 'all other essential oils not otherwise provided for.'"

Your decision, therefore, is hereby affirmed.

I am very respectfully,

J. F. HARTLEY,
*Acting Secretary.*

39 U. S. Circuit Court, S. D. N. Y.

DEF'T'S EXHIBIT No. 2 C.

James D. Fish, stenographer.

TREASURY DEPARTMENT, *May* 10, 1872.

C. A. ARTHUR, *Collector of Customs, New York.*

"SIR: Your action in the assessment of duty at the rate of 50 per cent. ad valorem on certain nitro-benzole embraced in the following named appeals of Messrs Arnson & Wilzinski is hereby affirmed; that is to say:

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| "Appeal No. | 1193 *a*, | dated | July | 12, | 1871, | Ship | 'Italy.' |
| " " | 1246 *a*, | " | " | 17, | " | " | 'Virginia.' |
| " " | 1246 *a*, | " | " | 17, | " | " | 'Abyssinia.' |
| " " | 1359 *a*, | " | " | 22, | " | " | 'Atlantic.' |
| " " | 1436 *a*, | " | Aug. | 1, | " | " | " |
| " " | 1475 *a*, | " | July | 31, | " | " | 'Aleppo.' |
| " " | 1988 *a*, | " | Sept. | 19, | " | " | 'Oceantic.' |
| " " | 2756 *a*, | " | Nov. | 29, | " | " | 'England.' |
| " " | 3050 *a*, | " | Dec. | 26, | " | " | " |

"I am, very respectfully,

"LEO S. BOUTWELL, *Secretary.*"

40 The COURT: You concede, Mr. Sanders, that those are the decisions of the Secretary of the Treasury; but you object to them on the ground that you before stated, first, that they are not pleaded; secondly, on the ground of the stipulation; thirdly, on the ground they were not communicated.

Mr. SANDERS: Yes, sir; we object on the grounds I stated when the papers were first offered, and we except to their admission.

Upon the application of defendant's counsel to direct a verdict in favor of the defendant the court said:

The COURT: Gentlemen of the jury, upon the questions of law in this case there being no question of fact the court has decided that this action is a statutory one, and that the statutory condi-
41 tions have not been performed by the plaintiffs. You will therefore render a verdict in favor of the defendant.

Under the direction of the court the jury so finds.

Mr. SAUNDERS: I would like it distinctly to appear that the ground of your honor's decision directing the verdict, is not a statute of limitations, but conditions precedent.

The COURT: I have stated it as clearly as I can state it, and I think all your points are saved. The stenographer took down what I said at the time; I have directed the verdict on the same grounds previously stated.

Mr. SANDERS: We except to the direction of the verdict in favor of the defendant.

And inasmuch as the matters aforesaid do not appear upon the record, the plaintiffs' counsel have caused this bill of exceptions to be made, and the same was duly settled as of the 2d
42 day of December, 1884, the day the said verdict was rendered, and of the October term of said court for 1884.

Correct.

ALFRED C. COXE. [L. S.]

KAUFMANN & SANDERS,
*Plaintiffs' Attorneys.*

ELIHU ROOT,
*U. S. Att'y & Att'y for Def't.*

Per T. G.

43 [Endorsed:] U. S. circuit court. Bernard Arnon and Ellis Wilzinski, N. S. 5991, plaintiffs, against Thomas Murphy, collector, defendant. Plaintiffs' bill of exceptions. Kaufmann & Sanders, attorney- for plaintiffs. U. S. circuit court. Filed Ap'l 21, 1885. ——— Giffot, clerk.

44 *Assignment of Error.*

U. S. Supreme Court of October Term, 1884.

BERNARD ARNSON and others, Plaintiffs in Error,
*ag'st*
THOMAS MURPHY, Collector of the Port of New York, Defendant in Error.

WASHINGTON, D. C.

Afterwards, to wit, on the 3d Monday of October, 1884, in the said term, before the judge of the circuit court of the United States for the southern district of New York, in the second circuit, come the said plaintiffs in error, by Kaufmann & Sanders, their attorneys, and say, that in the records and proceedings aforesaid, there are manifest errors in this, to wit:

45 First. That the court erred in ordering a verdict and judgment for defendant against plaintiffs adjudging that the bringing of suit within ninety days after the decision of the Secretary of the Treasury in each of the plaintiffs' appeals from the decisions of the defendant on plaintiffs' protests against excessive duties claimed to be recovered herein, was a condition precedent to be provided by plaintiffs. Whereas plaintiffs maintained and maintain that said limitation of ninety days was in the nature of a statute of limitations requiring to be set up and proved by defendant.

Second. That the court erred in directing a verdict for defendant on the ground that plaintiffs had not proved facts sufficient
46 to constitute a cause of action.

Third. That the court erred in excluding plaintiffs' testimony; that they had received no notice of any decisions of the Secretary of the Treasury on their appeals from the decisions of the defendant on their protests in the claims herein, and that the court

erred in ruling that it was not incumbent upon the said Secretary to communicate his said decisions.

Fourth. That the court erred in overruling plaintiffs' objection to the admission of the decisions of the Secretary of the Treasury that they were not communicated.

Sixth. That the court erred in not directing a verdict and ordering judgment for the plaintiffs against defendant for the
47 amount proved due them, with interests and costs.

And this they, Bernhard Arnson and Ellis Wilzinski, by their attorney, are ready to verify.

Wherefore they pray that the judgment aforesaid for the errors may be revoked, annulled, and altogether held for nothing, and that they may be restored to all things they have lost by occasion of the judgment aforesaid.

KAUFMANN & SANDERS,
*Plaintiffs' Attorneys.*

"Endorsed:" U. S. Supreme Court. Bernhard Arnson and another, plaintiff- in error, aga't Thomas Murphy, collector, &c., defendant in error. Original assignment of error. Kaufmann & Sanders, attorneys for plaintiffs. Temple court, of Beekman
48 street, New York. Due and timely service of a copy of within assignment of errors is hereby admitted. Dated June 22, 1885. Elihu Root, attorney for defendant in error. U. S. circuit court. Filed June 22, 1885. Timothy Griffith, clerk.

49 *Joinder in Error.*

Supreme Court of the United States.

BERNARD ARNSON & ELLIS WILZINSKI, Plaintiffs in Error,
*vs.*
THOMAS MURPHY, Defendant in Error. } 5991.

And afterwards, to wit, on the second Monday of October, in said term, the said defendant in error, by Elihu Root, his attorney, comes here into court and says that there is no error either in the record or proceedings aforesaid, or in the giving of the judgment aforesaid.

And he prays that the said Supreme Court, before the justices thereof now here, may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid above assigned
50 for error, and that the judgment aforesaid, in favor aforesaid, given may be in all things affirmed, &c.

ELIHU ROOT,
*Attorney for Def't in Error.*

Endorsed: U. S. Supreme Court. Bernard Arnson & Ellis Wilzinski, pl'ff- in error, *vs.* Thomas Murphy, def't in error. Joinder in error. Elihu Root, United States attorney, attorney for defendant in error. Service of a copy of the within is hereby admitted. New York, June 23, 1885. Kaufmann & Sanders, attorneys for plaintiffs in error. *Kaufmann & Sanders, attorneys for plaintiffs in error.* U. S. circuit court. Filed June 23, 1885. Timothy Griffith, clerk.

51 Circuit Court of the United States.

BERNARD ARNSON & ELLIS WILZINSKI, Plaintiffs,
*ag'st*
THOMAS MURPHY, Collector of the Port of New York, Defendant.

Know all men by these presents, that we, Louis A. Wagner of the city of Brooklyn, and county of Kings, and Abraham Kaufmann of the city and county of New York, in the State of New York, are held and firmly bound unto Thomas Murphy, collector of the port of New York, in the full and just sum of two hundred and fifty dollars, to be paid to the said Thomas Murphy, collector, his certain attorney, executors, administrators, or assigns; to which payment
52 well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this twenty-second day of June, in the year one thousand eight hundred and eighty-five.

Whereas Bernhard Arnson and Ellis Wilzinski have prosecuted a writ of error to the Supreme Court of the United States, to remove the judgment rendered in a certain suit in the circuit court of the United States of America for the southern district of New York, in which said Bernhard Arnson and Ellis Wilzinski are plaintiffs, and Thomas Murphy, collector of the port of New York, is defendant, which judgment was rendered by the judge of the said cir-
53 cuit court, and the said plaintiffs having obtained a writ of error and filed a copy thereof in the clerk's office of the said court, to reverse the said judgment in the aforesaid suit, and a citation directed to the said defendant, citing and admonishing him to be and appear at a Supreme court of the United States, to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said Bernhard Arnson, and Ellis Wilzinski shall prosecute their said writ of error to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else, to remain in full force and virtue.

A. KAUFMANN. [L. S.]
LOUIS A. WAGNER. [L. S.]

Sealed and delivered in the presence of—
GEO. N. SANDERS.

Approved by—
ELIHU ROOT,
*U. S. Att'y, S. B. C.*

54 From what I know I believe the above bounden, A. Kaufmann & Louis A. Wagner, to be worth severally upwards of one thousand dollars above their several liabilities.

LEWIS SANDERS.

CITY AND COUNTY OF NEW YORK, *ss:*

I, Elbridge G. Duvall, Jr., a notary public of the city, county, and State of New York, and duly qualified to take acknowledgments of

all deeds, bonds, and undertakings therein, do hereby certify that on this 22nd day of June, A. D. 1885, before me duly appeared Abraham Kaufmann of the city of New York, and Louis A. Wagner, of the city of Brooklyn, both to me known, and known to me to be
55 the individuals described in and who executed the foregoing bond or undertaking, and they did severally sign, seal, and deliver the same in my presence and severally acknowleged that they executed the same for the purposes therein maintained.

In witness whereof I have hereunto set my hand and seal on this 22d day of June, 1885.

[SEAL.] E. G. DUVALL, JR.,
*Notary Public New York Co., N. Y.*

SOUTHERN DISTRICT OF NEW YORK, } ss:
*City and County of New York,* }

Louis A. Wagner, one of the obligors in the above undertaking, being duly sworn, says: That he is worth the sum of five hundred dollars above all his just debts and liabilities, and that he is well acquainted with Abraham Kauffmann and his affairs, having
56 been one of his attorneys for a number of years; and that said Kaufmann, the other obligor, is worth the sum of five hundred dollars over and above all his just debts and liabilities, and that the reason why his affidavit is not appended is that the form sent by the clerk of the U. S. Supreme Court did not require it, and Mr. Kaufmann was allowed to depart without making it.

LOUIS A. WAGNER.

Sworn to before me, this 22d day of June, 1885.

E. G. DUVALL, JR.,
*Notary Public New York Co., N. Y.*

Endorsed: U. S. circuit court. Bernhard Arnson *et al.*, plaintiffs, *ag't* Thomas Murphy, collector, &c., defendant. Undertak-
57 ing. Kaufmann & Sanders, att'vs for plaintiffs, Temple court, Beekman street, New York. U. S. circuit court. Filed June 22d, 1885. Timothy Griffith, clerk.

58 UNITED STATES OF AMERICA, ss:

To Thomas Murthy, collector, &c., defendant in error, and Elihu Root, Esq., U. S. attorney, for defendant, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be held at Washington on the second Monday of October, eighteen hundred and eighty-five, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of New York, in the clerk's office, on the 22d day of June, 1885, wherein Bernhard Arnson and another are plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice not be done to the parties in that behalf, and the said judg-

ment set aside and judgment entered for plaintiffs for the amount proved to be due them, with costs.

Dated New York, June 22d, 1885.

CH. L. BENEDICT,
*District Judge, sitting as Circuit Judge.*

59 [Endorsed:] 5991. U. S. Supreme Court. Bernhard Arnson and another, plaintiff in error, *against* Thomas Murphy, defendant. Original citation. Kaufmann & Sanders, attorneys for plaintiffs, Temple court, 7 Beekman street, New York. Due and timely service of a copy of within citation is hereby admitted. Dated June 22, 1885. Elihu Root, attorney for defendant in error. Stamp: U. S. circuit court. Filed June 22, 1885. Timothy Griffith, clerk.

Endorsed on cover: S. New York C. C. U. S. No. 887. Bernhard Arnson and Ellis Wilzinski, plaintiffs in error, *vs.* Thomas Murphy, late collector of the port of New York. Filed July 20, 1885.

115-179.

# U. S. Supreme Court.

ARNSON

vs.

MURPHY.

No. 887.
October Term, 1885.

## Motion to Advance.

And now comes the plaintiff in error, by his counsel, and moves the Court to advance this cause for argument at this current Term, on the ground that the cause has been once adjudicated on the merits on a former writ of error. (*Vide* No. 287, October Term, 1883, reported 109 U. S. Reps., 238.)

LEWIS SANDERS,
Of Counsel.

115-179

Clerk's Supreme Court U. S.
FILED
NOV 11 1895
JAMES H. McKENNEY,

# UNITED STATES SUPREME COURT.

**BERNARD ARNSON and another,**

*Plaintiffs in Error,*

*against*

**THOMAS MURPHY, Collector of the Port of New York,**

*Defendant in Error.*

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

# Brief and Points for Plaintiffs' in Error.

LEWIS SANDERS,
GEORGE N. SANDERS,
*Of Counsel for Plaintiffs in Error.*

C. G. BURGOYNE'S "Quick" Print, 146-150 Centre St., N. Y.

# Supreme Court of the United States.

OCTOBER TERM, 1885.

No. 887.

BERNARD ARNSON and ELLIS WILZINSKI,
Plaintiffs in Error,

AGAINST

THOMAS MURPHY, late Collector of the Port of New York,
Defendant in Error.

*In Error to the Circuit Court of the United States for the Southern District of New York.*

## STATEMENT.

This cause was argued in this Court, October Term, 1883, and is reported in 109 U. S. R., 238. The only point then presented by the record was: Is the Federal statute, regulating and limiting actions against collectors for the recovery of duties paid under protest, exclusive, or can resort be had to the State Statute of Limitations?

The plaintiffs in error maintained that the Federal statute was the exclusive Statute of Limitations. The Solicitor-General, by his brief, claimed that the provisions of the Federal statute were "not of the nature of Statutes of Limitations, but constitute reasonable conditions precedent to any right of suit."

On the second trial, now brought up for review, the plaintiffs

rested on the same evidence presented by the first record and on which this Court reversed the judgment in favor of defendant.

The plaintiffs proved the importation of the nitro-benzole, the entry thereof, the imposition of duty thereon by the defendant as Collector of the Port of New York at fifty per cent. *ad valorem* as an essential oil, due protest "in writing against the exaction of said duty;" due appeal "to the Secretary of the Treasury from defendant's decision exacting said duty;" that suit was brought more than ninety days from the date of appeal; that the true rate of duty was forty cents per gallon, and the excess paid was $1,644.65 (pp. 8, 9, 10 and 11).

Now, as then, there was no proof of any decision on appeal by the Secretary of the Treasury at the close of plaintiffs' case. Defendant moved the Court to direct a verdict for defendant "on the "ground that to entitle plaintiffs to recover, after an appeal has "been taken from the decision of the Collector as to the rate and "amount of duty, the plaintiffs, to recover, must show either that "they paid the duties before the decision of the Secretary and "brought their suit within ninety days after such decision, or that "they paid the duties after such decision and brought their suit "within ninety days after the payment of such duties, or that ninety "days had elapsed after their appeal to the Secretary and no de-"cision had been made, and that they had brought their suit after "the expiration of such ninety days" (fols. 29 and 30).

The Court, in ruling on this motion, said: "Without this statute "the plaintiff has no standing whatever in Court. It is strictly a "statutory proceeding which he is required to follow, and as I read "the statute, there are three conditions for him to fulfil before he "can maintain his action. First, he must have protested within "ten days; second, he must have appealed within thirty days, and, "third, he must have brought his action within ninety days after "adverse decision by the Secretary of the Treasury, or if he pro-"ceeds upon the other clause of the statute, he must show that "there has been no decision, and that this action was brought after "ninety days from appeal. I see no way to separate these condi-"tions. * * * Therefore I must hold that it is incumbent upon "the plaintiff, as a condition precedent to his recovery, to show first "that he has protested; secondly, that he has appealed, and thirdly, "that this action was brought within the time required by statute" (fols. 32 and 33).

"MR. SANDERS: It does not appear that there was any decision "by the Secretary of the Treasury."

"THE COURT: To maintain your case, you must show affirma- "tively that there was no decision."

Plaintiffs except (fol. 34).

The plaintiffs then offered to prove that they had never received any notice prior to the commencement of this action of the decisions on their appeals. This was objected to "on the ground that it is immaterial whether the decision was received or not."

"THE COURT: I think the objection is well taken, as I read the "statute it is not incumbent upon the Secretary to communicate "the decision."

The plaintiffs except (fols. 34 and 35).

The defendant then offered certified copies of decisions of appeals without showing that they had ever been sent or communicated.

The appeals taken in April and May, 1871, were decided July 12th, same year; those taken from July to December, 1871, were decided May 10, 1872, or ten months after the first appeal. Plaintiffs objected to their admission, and the Court said: "In my view "of the case these decisions are unimportant" (fol. 35), but admitted them to raise the questions presented. Plaintiffs excepted (fol. 40) and the Court then "directed a verdict on the same grounds "previously stated" (fol. 41), and plaintiffs duly excepted.

## Assignment of Errors.

1st. The bar to suit, raised by the statute after the lapse ninety days from the date of the Secretary of the Treasury's decision on appeal, is not a condition precedent, but is a statute of limitations to an accrued cause of action and must be pleaded and proved as matter of defense, is a condition subsequent. The right to sue after ninety days from the appeal may be exercised on the ninety-first day and can then neither be premature nor too late, whether the Secretary has already rendered a decision or thereafter renders a decision, or never decides the appeal, from which it ap-

pears that a fact which occurs or may occur subsequent to the right to sue and to action brought, and which may be either a favorable decision or no decision, is not a condition precedent to be proved.

2d. The decision of the Secretary should, to set the statute running, have been communicated.

3d. If the proof of the decision of the Secretary of the Treasury was a condition precedent and need not be communicated, the proof was in, though offered by defendant, and the condition precedent was made out.

4th. The question presented at the close of plaintiffs' case on the second trial was presented on the former appeal, and was not open for adverse decision below.

## POINTS.

**I.** The Court below held that this Court did not decide on the former appeal, that the period after which a suit to recover customs duties was barred by statute was a statute of limitations, and that the language of the decision that the statute contains "conditions "which fix the time when the suit may begin and prescribe the "period at the end of which the right to sue shall cease" (p. 243), does not directly or indirectly decide the question. From the former argument of this case, the contention of the Solicitor-General that the Federal statute constitutes "reasonable *conditions precedent* to any right of suit;" the rejection of that view by this Court, in an opinion perspicuously free from ambiguity or obscurity, nothing is left to argue here respecting the former decision.

**II.** Assuming, for the sake of argument and a respectful consideration of the opinion of the Court below, that the point now presented was not decided on the former appeal, then an event which may happen after action properly brought cannot be or by subsequent happening retroactively become a condition precedent to the right of bringing the action.

Sections 2931, 3226, 3227 and 5057, R. S., are *in pari materia*.

The limitations contained in the Internal Revenue law were considered limitations coupled with conditions precedent in

Cheatham vs. United States, 92 U. S., 87.
James vs. Hicks, 110 U. S., 275.

The same is true regarding the bankruptcy limitation.

Upton vs. McLoughlin, 105 U. S., 640–2.

These sections and the various acts of which they are the final amendments enforce limitations of three, six and twelve months and two years. This Court has held both the internal revenue and bankruptcy sections to be statutes of limitations. But according to the Court below, while six or twelve months might be a statute of limitations, three months are too short for a limitation; and the proof of a decision *subsequent* to the accruing of the right of action is a condition precedent to recovery, and it is wholly immaterial whether a decision has or has not been rendered, but the fact either way must be proved, and it is indifferent which. The action may be maintained on the ninety-first day from the date of the appeal, whether any decision has been rendered or not.

The decision *ex post facto* the action, becomes a condition precedent, rendered or not rendered.

And the absence of proof of a decision does not even raise a presumption that no such decision has been rendered.

A condition precedent, antecedes the right to sue; a condition subsequent is a limitation on the right accrued.

Angell on Limitations (5th Ed.), p. 1.

**III.** The decisions of the Secretary of the Treasury having been afterwards put in, though by the defendant, the condition precedent (?) was proved, and it was error for the Court to rule the proof necessary when not made and immaterial.

**IV.** That this provision is in the nature of a statute of limitations is further shown by the consideration that the plaintiff has ninety days after the decision within which to serve his summons in the State, as well as in the Federal, Courts. But under the statutes

this time would not *commence* to run, if the defendant were then out of the jurisdiction, until the defendant returned. And if it were otherwise, it would be in the power of defendant to prevent any recovery in all cases, by simply absenting himself for ninety days Hence it is not a condition precedent for plaintiff to establish, but a limitation for defendant to plead and prove, and susceptible always of being avoided by plaintiff's showing that the defendant was out of the State, &c.

Dorr vs. Swartwout, Collector, 1 Blatch., 179.
Richardson vs. Curtis, 3 Blatch., 385.

**V.** So the case is not changed by the mere fact that the decisions were admitted without the statutory limitation being pleaded and without the Court's changing its ruling, that the provision was not a limitation. Such ruling was not a setting up of the decisions as a limitation, and did not call upon plaintiff to meet any such issue. On the contrary, the setting up of the Statute of Limitations would have required an amendment of defendant's answer. The New York Code of Civil Procedure is explicit as to this saying: "The objection that the action was not commenced within the time "limited *can be taken only by* answer." (Section 413). The old Code contained precisely the same language (Section 74) and the New York Court of Appeals said: "By section 74 of the Code it "is provided that the objection that the action was not commenced "within the time limited *can only be taken by answer.* That de- "fense has not been interposed and *consequently cannot now be con-* "*sidered.*"

People vs. Williamburgh Turnpike Co., 47 N. Y., 581.

This is controlling on this Court.

Retzer vs. Wood, Collector, 109 U. S., 185, 187.
Upton vs. McLoughlin, 105 U. S., 640.

But far from setting up or attempting to set up the statutory limitation, defendant stood by his proposition that the ninety-day clause was not a limitation, and the Court, after admitting the decisions in evidence as surplusage, reiterated its former ruling in rendering judgment (fol. 41).

Defendant's position was that he had a right to interject the de-

cisions of the Secretary into plaintiff's proofs. It was but a renewal of the offer made in the middle of plaintiff's proofs (at fol. 31), and it will be observed that when the decisions were finally admitted, plaintiffs had not rested (fol. 35). The idea suggested was that the decisions would show that plaintiffs had not fulfilled a condition precedent, and that the decisions did not require to be proved as a defense. The Court rejected this novel idea, yet let them in to give the Supreme Court the opportunity of doing the same, and thereby preventing this point being raised on a new trial, if any (fol. 35).

## Authorities on Statutes of Limitation.

It will be seen that no matter how imperative the language of a statute is in cutting off an accrued right of suit, it constitutes a *limitation* to be set up and not a *condition precedent.*

In Upton vs. McLoughlin (105 U. S., 540) the Bankruptcy Act was construed. It provided that "No suit either at law or in equity *shall be maintainable* unless brought within two years," &c. Language could not be more imperative, and the Circuit Court held that it constituted an absolute bar, but this Court reversed that decision, saying that it was "Dependent on the principles applicable to statutes of limitations generally" (*Id.*, 642).

## Defendants' Authorities.

Selover vs. Coe, 63 N. Y., 438, 442, 443:

This was an action held to be *prematurely* brought before the expiration of three years, prescribed by statute. The reasoning of the opinion is entirely in our favor.

Ross vs. Duval, 13 Pet., 45:

This was not a trial at all but a motion as to set aside a *capias ad satisfaciendum.* The reasoning on p. 60 is likewise in our favor.

**VI.** The decision of the secretary of the Treasury on an appeal is the discharge of a judicial function. It is final and conclusive

unless suit be brought within ninety days therefrom. It is a decision on the importer's appeal.

In every procedure where the rights of another are to be determined by the happening of an event uncertain in point of time actual or constructive notice is essential to protect such rights and becomes inherent as mere matter of justice.

The Court below ruled that it was "not incumbent upon the Secretary to communicate the decision" (fol. 35). The exception to this ruling presents the question whether our laws are subject to the reproach that it provides no method of publication of the final determination of the rights of the citizen whose goods have been unlawfully assessed.

"No person shall be deprived of property without due process of law."

Is the "decision" of the Secretary of the Treasury spoken of in the statute confined to a mental operation, a conclusion of the mind recorded in the memory or does it require the publication or promulgation of such mental operation, and if so, in what manner? The statute provides no place where this decision may be recorded or examined by the appellant. If, as may be, the decision is made the day after the appeal, the importer has but one day to sue in after the expiration of the ninety days he must await the decision of the Secretary, unless he obtains prior actual notice of such decision.

By this construction of the statute the ninety days is reduced to one, for before ninety days have elapsed from the appeal he cannot sue except a decision has been rendered, and after ninety days from the decision he cannot sue, and but one day may intervene between the expiration of the two periods, and if the ninetieth day falls on Sunday, the expiration of the ninety days from the appeal will, in the case supposed, be the ninetieth day from the decision, and a suit begun on that day would be premature, and on the next too late. But it is clear that the statute intended that the importer should have an actual ninety days beginning to run from a fixed period.

It will be argued that the letter of advice from the Secretary to the collector written six, eight or ten months or more after the taking of the appeal is notice to the appellant. Not actual notice clearly. In what way is it constructive notice? It is not to the interest of defendant to communicate the contents to the importer; he is not required to do so. The letter is not public property; is not required to be recorded or exhibited.

What is there in the genius of our government, the character of the law or the exigencies of the Treasury which demand that the statute be so construed as to make an uncommunicated decision set the statute running? What good end is to be obtained by so doing? When Congress shall have expressed in terms that no notice, actual or constructive, is necessary, the legality of such a provision will be a proper subject of discussion: they have not done so, and the question is. Shall the Courts graft such a provision on the statute and thus render it wholly nugatory, and to what end? to deprive the citizen of his property without any process of law? A mere decree for confiscation under color of law.

The suggestion that the Collector might, as matter of favor allow one to see his letter of advice is an idle one. The rights of the importer are in issue and are to be determined irrespective of what may be had by favor.

In the absence of provision by Congress for a constructive notice, actual notice must have been intended.

**VII.** Defendant's argument requires the maintainance of two propositions, which taken together reduce it to an absurdity by requiring plaintiff to prove an impossible negative as affirmative proof of their cause of action having accrued. These two propositions are:

1st. That plaintiffs must prove that no decision had been rendered by the Secretary of the Treasury.

2d. That no notice of such decision was necessary to make it operative; but that it took effect immediately upon being made by the Secretary, no matter how secretly.

This requires plaintiffs to prove an impossible negative; to prove that the secretary has not made a secret decision. No proofs that could be offered by plaintiffs would accomplish this. Nothing short of the examination of the Secretary as a witness could prove that he had not made a pigeon-hole decision. But such examination could never be had before suit, and hence would never be obtainable as a basis of suit.

A construction of the statute so subversive of all rules and principles of evidence cannot be sustained.

Such a statute would be unconstitutional; as depriving a party

of a legal right without notice, and the clause making such a provision would have to be nullified by the Courts.

Stuart vs. Palmer, 74 N. Y., 183.

Again, the defendant's construction would make the statute contradict itself in this, that while it gave the importer an absolute right of appeal from the Secretary's decision to the Courts, it at the same time would give the Secretary an absolute right to prevent any such appeal to the Courts by concealing his decision for for ninety days, until the statute had run, barring suit.

**VIII.** The former record having presented the question of whether the same proof entitled plaintiff to recover it was *stare decisis*—whether expressly passed upon in the opinion or not. The proof of the Secretary's decisions on the second trial did not change in the least the issue as to whether the ninety-day clause was a condition precedent or a limitation. If the former, plaintiffs equally failed to prove its performance on the first trial.

The former record read:

"And no decision of the Secretary of the Treasury appeared ever to have been made on any of said appeals" (see former record, fol. 21).

This was founded on the same evidence that plaintiffs had received no notice of any decisions, and cannot grammatically be made to express anything more than that it did not appear that there were any decisions. The defendant very well knew this and could have raised the same point as now if he had chosen. But it was inconsistent with his argument. On his contention that the State statute applied, it was immaterial whether any decisions by the Secretary were made or not. Hence defendant deliberately abandoned the present point on the first appeal, and cannot be allowed to maintain it on the same record now without great injustice to plaintiffs, who have taken this second appeal, relying on the decision that they were entitled to a verdict on the former record. If this practice were tolerated there might be no end to new trials in a case involving many points, a case might go up and down twenty times on the same record.

There is a decision of the New York Court of Appeals directly in point. The Court says: "This case presents no question for

"our consideration, not fully determined by this Court when the "case was here on the former appeal (34 N. Y., 30). *It must* "*necessarily have then been determined* that the pleadings were sufficient to authorize the judgment in favor of Ketchum, Rogers and "Bement, to which it was found they were entitled, or the case "would not have been sent back to the Special Term for retrial." "* * * "*The Court came to the conclusion and held that under* "*the pleadings and proofs, the defendants Ketchum, Rogers and Be*"*ment were entitled to affirmative relief.*" * * * "No new facts "were elicited on the retrial to change the case. It stands now "where it stood before in every material particular." * * * "If "the rule of *stare decisis* is of any value, it should be adhered to in "this case, where the precise question is again presented in the "same Court between the same parties and substantially on the "same state of facts."

New York and N. H. R. R. Co. vs. Ketchum, 3 Keyes, 363.

This Court held in Beloit vs. Morgan, 7 Wall., 621, that the rule "extends not only to the questions of fact and of law which were "decided in the former suit, but also to the grounds of recovery or "defense which might have been but were not presented." Saying: "All the objections taken in this case might have been taken in "that." * * * "The Court requires the parties to bring forward "their whole case," and will not allow them "to open the same "subject of litigation in respect of a matter which might have been "brought forward as a part of the subject in contest, but which was "not brought forward, only because they have from negligence, in"advertence, or even accident omitted a part of their case."

**IX.** There is no possible ground for remanding this cause again to see whether the Court below might not allow the answer to be amended so as to set up this limitation; for the Court gave emphatic expression to its discretionary judgment when it said:

"I have reached the conclusion I have with a great deal of regret, because it seems to me that this is a meritorious case" (fol. 32).

This Court refused to remand a similar case to allow the Statute of Limitations to be set up, and rendered judgment of reversal absolute in the following language:

"The defendant in error asks that if judgment be reversed the

case be remanded so that the Statute of Limitations may be pleaded." * * * The record shows that the defendants' attorney had notice by the declaration that the plaintiff's claim accrued before a date more than eight years prior to the filing of the plea. Under such circumstances, it would not be a fair exercise of discretion not to hold the defendant to his legal status. The judgment is reversed, and the case is remanded to the Circuit Court with directions to enter a judgment for the plaintiff for $61.30, with interest."

Retzer vs. Wood, Collector, 109 U. S., 185, 188.

*A fortiori* does this apply in this case, being a second appeal, and defendant having had two opportunities to set up all his defenses below.

X. *Only those questions decided by the Court below will be reviewed here.* Hence judgment will not be affirmed on a different ground.

McDonald vs. Peters, 1 Peters, 620–1.
Retzer vs. Wood, 108 U. S.
Brockett vs. Brockett, 3 How., 691–2.
U. S. vs. Larkin, 18 How., 557, 561.
Hall vs. Wisconsin, 103 U. S., 8.

"But we are of opinion that the record must show that the question as to whether it appeared by the petition that the action was barred by the statute was distinctly presented to and raised before the District Court. This does not appear as before stated."

*Upton vs. McLoughlin, 105 U. S., 646.*

In O'Brien vs. Mechanics' and Traders' F. Ins. Co., 56 N. Y., 52, 54. Opinion of the Court, per AILEN, J. *Held:* "The plaintiff "was turned out of Court, and his complaint dismissed, solely upon "the ground that the attachment had never been levied. Two other "grounds were suggested by the defendant in his application to "dismiss the complaint, but neither was considered or passed upon "by the Court. The objections are capable of being obviated and "overcome by other and further evidence, and, that being the case, "the defendant cannot have the benefit of them upon this appeal. "It is only when the record discloses an insuperable difficulty to a

" recovery by the plaintiff that a judgment against him will be sus-
" tained, if the Court below erred in the decision actually given."

See also

Liverpool, N. Y. and P. S. S. Co. vs. Commissioners of Emigration, 113 U. S., 33.

**XI.** Judgment should be reversed and the case remanded to the Circuit Court with directions to enter judgment for the plaintiffs on the following stipulation in the case, viz.:

" It was agreed by the counsel for the respective parties that if plaintiffs were entitled to recover anything, that the amount should be assessed before the proper officer at the Custom House and entered in the judgment " (fol. 25).

This stipulation was brought up expressly for this purpose, and as the essential facts were otherwise agreed upon (fol. 22), these will be found to be taken *literatim* from the former record (fol. 18, *et seq.*). Hence this Court will now render the judgment that the Court below should have rendered.

Retzer vs. Wood, 109 U. S., 185, 188 (quoted *supra*, Point "IV.").

LEWIS SANDERS,
GEORGE N. SANDERS,
Of Counsel for Plaintiffs.

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115-179

# In the Supreme Court of the United States.

OCTOBER TERM, 1885.

BERNHARD ARNSON AND ELLIS WILZINSKI, plaintiffs in error,
*vs.*
THOMAS MURPHY, LATE COLLECTOR of the port of New York.
} No. 887.

## BRIEF FOR THE DEFENDANT.

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## BRIEF FOR THE DEFENDANT.

This was a suit brought by the plaintiffs in error in the supreme court of New York to recover money alleged to have been illegally exacted by the collector for customs duties, and was removed by the defendant by writ of certiorari to the circuit court of the United States for that district.

On the trial, the court directed a verdict in favor of the defendant, to which exception was duly taken, and the judgment thereon was brought under review by writ of error to this court at the October term, 1883.

This court decided on the 19th of November, 1883, that it was error in the circuit court to apply as a bar to the action the limitation prescribed by the statute of New York. For that error judgment was reversed and the

cause remanded, with instructions to grant a new trial. It came on regularly for a new trial upon the mandate of this court, dated January, 1884, before his honor Alfred C. Coxe, district judge, sitting as a circuit judge by regular appointment, and a jury, at the circuit court of the United States held in and for the southern district of New York on the second day of December, 1884.

Upon the question of law involved (there being no question of fact), the court decided that the action was a statutory one, and that the statutory conditions had not been performed by the plaintiffs. Accordingly a direction was given to the jury to render a verdict in favor of the defendant.

The plaintiffs now ask that the judgment of the court below may be reversed upon the following grounds:

1. That the court erred in ordering a verdict and judgment for defendant against plaintiffs, adjudging that the bringing of suit within ninety days after the decision of the Secretary of the Treasury in each of the plaintiffs' appeals from the decisions of the defendant on the plaintiffs' protest against excessive duties claimed to be recovered herein was a condition precedent to be proved by the plaintiffs, whereas plaintiffs maintain that said limitation of ninety days was in the nature of a statute of limitations, required to be set up and proved by defendant.

2. That the court erred in directing a verdict for defendant, on the ground that plaintiffs had not proved facts sufficient to constitute a cause of action.

3. That the court erred in excluding plaintiffs' testimony, that they had received no notice of any decisions of the Secretary of the Treasury on their appeals from

the decisions of the defendant on their protest in the claims herein, and that the court erred in ruling that it was not incumbent on said Secretary to communicate his said decisions.

4. That the court erred in overruling plaintiffs' objection to the admission of the decisions of the Secretary of the Treasury that they were not communicated.

5. That the court erred in not directing a verdict and ordering judgment for the plaintiffs against defendant for the amount proved as due them, with interest and costs.

We submit that the only question presented by the record is whether the burden was upon the plaintiffs to prove that the conditions of the statute had been fulfilled, or upon the defendant to prove that they had not been. The cause of action arose under the act of June 30, 1864 (13 Stats., 202), the fourteenth section of which is now section 2931 of the Revised Statutes. That section reads as follows:

> On the entry of any vessel, or of any merchandise, the decision of the collector of customs at the port of importation and entry, as to the rate and amount of duties to be paid on the tonnage of such vessel or on such merchandise, and the dutiable costs and charges thereon, shall be final and conclusive against all persons interested therein, unless the owner, master, commander, or consignee of such vessel, in the case of duties levied on tonnage, or the owner, importer, consignee, or agent of the merchandise, in the case of duties levied on merchandise, or the costs and charges thereon, shall, within ten days after the ascertainment and liquidation of the duties by the proper officers of the customs, as well in cases of merchandise entered in bond as for consumption, give notice in writing to the

collector on each entry, if dissatisfied with his decision, setting forth therein distinctly and specifically the grounds of his objection thereto, and shall, within thirty days after the date of such ascertainment and liquidation, appeal therefrom to the Secretary of the Treasury. The decision of the Secretary on such appeal shall be final and conclusive, and such vessel or merchandise, or costs and charges, shall be liable to duty accordingly unless suit shall be brought within ninety days after the decision of the Secretary of the Treasury on such appeal for any duties which shall have been paid before the date of such decision on such vessel, or on such merchandise, or costs or charges, or within ninety days after the payment of duties paid after the decision of the Secretary. No suit shall be maintained in any court for the recovery of any duties alleged to have been erroneously or illegally exacted until the decision of the Secretary of the Treasury shall have been first had on such appeal, unless the decision of the Secretary shall be delayed more than ninety days from the date of such appeal in case of an entry at any port east of the Rocky Mountains, or more than five months in case of an entry west of those mountains.

Section 3011 of the Revised Statutes provides that—

Any person who shall have made payment under protest, and in order to obtain possession of merchandise imported for him, to any collector, or person acting as collector, of any money as duties, when such amount of duties was not, or was not wholly authorised by law, may maintain an action in the nature of an action at law which shall be triable by jury, to ascertain the validity of such demand and payment of duties, and to recover back any excess so paid. But no recovery shall be allowed in such action unless a protest in writing, and signed by the

> claimant or his agent, was made and delivered at or before the payment, setting forth distinctly and specifically the grounds of objection to the amount claimed, and appeal shall have been taken as prescribed in section 2931.

By reference to section 2931, already referred to, it will be seen that the written protest must be made within ten days, and the appeal to the Secretary of the Treasury within thirty days from the ascertainment and liquidation of the duties by the proper officer. The decision of the Secretary on such appeal shall be final and conclusive, unless within ninety days after it was made suit is brought; and no suit shall in the mean time, pending appeal, be brought, unless the decision by the Secretary shall be delayed more than ninety days from the date of the appeal, if arising upon an entry at any port east of the Rocky Mountains.

When the case was here before (109 U. S. Repts., 238) this court said:

> It appears to us quite plain, from the reading of the statute, that no action arises to the claimant in such cases until after a decision against him by the Secretary of the Treasury; and that his suit against the collector is barred unless brought within ninety days after an adverse decision upon his appeal; but, with the proviso that if such decision is delayed more than ninety days after the date of his appeal, it is at the claimant's option either to sue, pending the appeal, treating the delay as a denial, or to wait until a decision is in fact made, and then sue within ninety days thereafter.
>
> It cannot be that he is obliged, in case for any reason a decision at the Treasury Department is de-